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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

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Nos. 1199 AND 1200.
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HEILIG BROTHERS CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

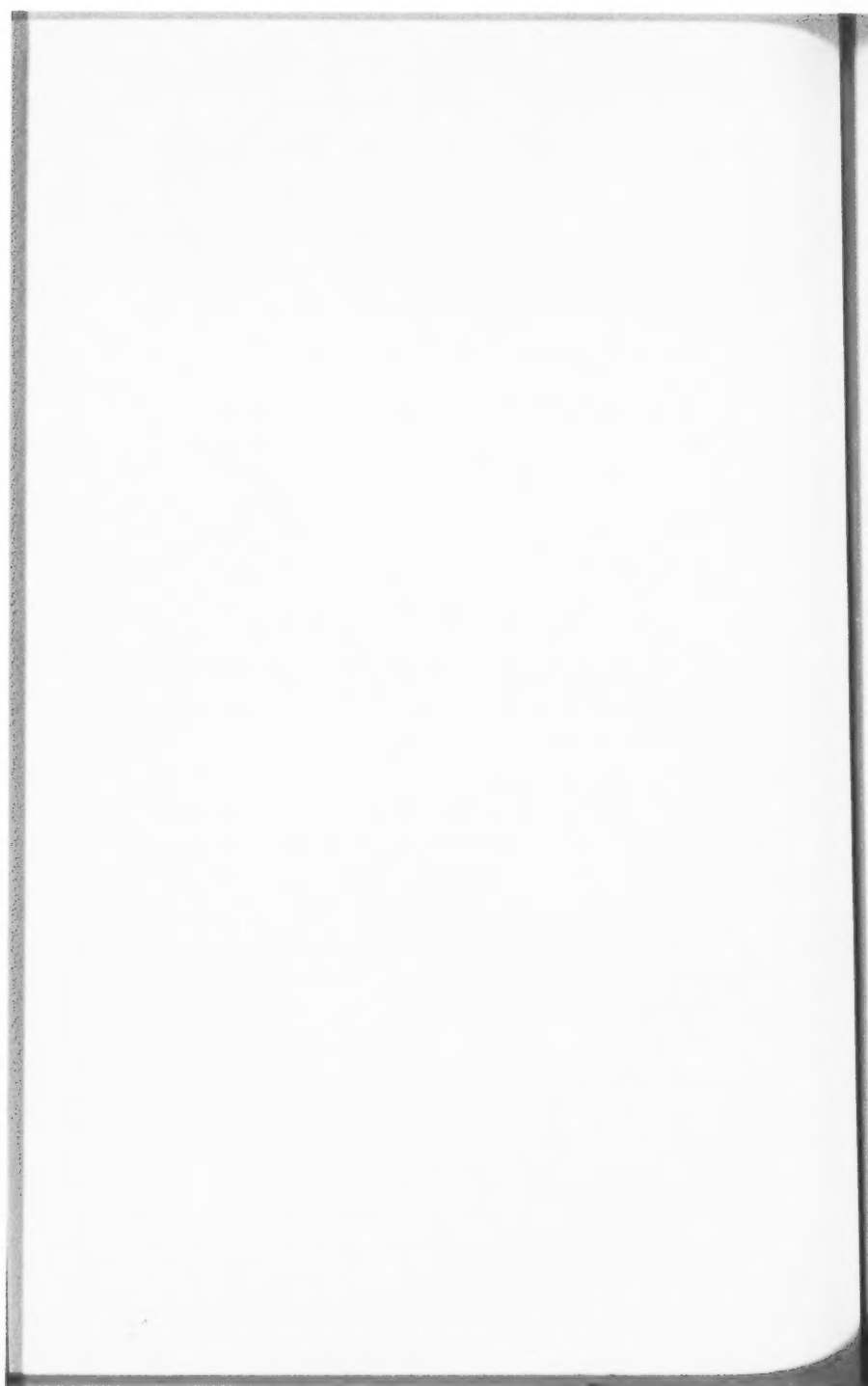
REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Petitioner, Heilig Brothers Co., submits the following brief in reply to the answering brief of the National Labor Relations Board, filed May 28, 1942.

This case brings up two phases of the same matter: (1) the refusal of the District Court to review the order of the Board during the vacation of the Circuit Court of Appeals; (2) the subsequent enforcement of the order of the Board by the Circuit Court of Appeals. The essential similarity of these two aspects of the same question is emphasized by the decision of this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, at page 24, where Mr. Chief Justice Hughes said:

“The Board is authorized to petition designated courts to secure the enforcement of its order. . . . Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of the order. Sec. 10.”

The same similarity between the enforcement and reviewing provisions is also brought out in *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, where, at page 49, Mr. Justice Brandeis, said:

“To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. . . . The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board.”

While the application for certiorari to review the action of the District Court in dismissing, during the vacation period of the Circuit Court of Appeals, petitioner's attempt to review the order of the Board, and the application for certiorari to review the action of the Circuit Court of Appeals in enforcing the order of the Board, are separately numbered on the calendar of this Court, only one question is raised on the merits, namely, whether the order of the Board should be sustained.

At the time the case was first argued before the Circuit Court of Appeals on the application of the Board for enforcement, notice of the decision of the District Court dismissing petitioner's application for review had not yet been given to the petitioner's attorney. On the application for re-hearing before the Circuit Court of Appeals, the dismissal of petitioner's application for review by the District Court was brought to the attention of the Circuit Court of Appeals, but the application for re-hearing was nevertheless denied.

The argument made on behalf of the Board, that this Court has no jurisdiction to consider the dismissal of petitioner's application for review, assumes that there is no case pending in the Circuit Court of Appeals. This is con-

trary to the fact. Both the reviewing and enforcing aspects of the order of the Board were brought to the attention of the Circuit Court of Appeals. This is sufficient to bring the case within the jurisdiction of this Court under Section 240 of the Judicial Code, which permits certiorari to issue from this Court in any case in a circuit court of appeals.

As shown by *Forsyth v. Hammond*, 166 U. S. 506, at page 513, this Court, on certiorari, is vested with a "comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals."

Mr. Justice Sutherland, in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, pointed out at page 567 that, on certiorari, the entire record is before this Court.

Hence the filing of the petition for certiorari on April 30, 1942, within three months of the order of the Circuit Court of Appeals granting enforcement of the order of the Board, brings before this Court the entire record both in the Circuit Court of Appeals and in the District Court.

Further ground for the jurisdiction of this Court in certiorari is Section 262 of the Judicial Code, 28 U. S. C. A., Sec. 377. As stated by Mr. Chief Justice Hughes in "*Re 620 Charch Street Building Corp.*," 299 U. S. 24, at page 26:

"That provision (Sec. 262) contemplates the employment of this writ (certiorari) in instances not covered by Sec. 240 of the Judicial Code (28 U. S. C. A., Sec. 347) and affords ample authority for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways.' *U. S. v. Beatty*, 232 U. S. 463, 467; *American Constr. Co. v. Jacksonville etc. R. Co.*, 148 U. S. 372, 379; *Re Chetwood*, 165 U. S. 443, 461; *Magnum Import Co. v. Coty*, 262 U. S. 159."

To the same effect is *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, at page 418, where Mr. Chief Justice Taft said:

“Our power to grant writs of certiorari extends to interlocutory as well as final decrees, and a mere denial of the writ to an interlocutory ruling of the Circuit Court of Appeals does not limit our power to review the whole case when it is brought here by certiorari on final decree.”

In an earlier case, Mr. Chief Justice Fuller reached the same conclusion in *Ex parte Chetwood*, 165 U. S. 443, 460, specifically mentioning the power of this Court to issue certiorari under the power “to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;” adding,

“and under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Constr. Co. v. Jacksonville &c., R. Co.*, 148 U. S. 372, 380.”

In particular, as pointed out in the *Chetwood* case, this Court may review questions of jurisdiction. This accords with a long line of decisions in this Court, beginning with *U. S. v. Hamilton*, 3 Dall. 17, and including *Ex parte Milligan*, 4 Wall. 2, *Union Pac. R. Co. v. Weld County*, 247 U. S. 282, and an unbroken line of decisions to the same effect.

Petitioner disagrees with the argument made on behalf of the Board that *U. S. v. Bitty*, 208 U. S. 393, 399-400, and *U. S. v. Heinze*, 218 U. S. 532, 545-546, are authority that equal access to the Courts need not be accorded to the Board and to the petitioner. Both are criminal cases holding that no constitutional right is denied to a criminal accused because he may not secure a review of the overruling of a demurrer to an indictment before final deter-

mination, while the state may, by writ of error, promptly review a ruling of the trial court sustaining a demurrer to an indictment. Aside from the answer that the accused may have his appeal heard after the case has been determined on the merits, the dissimilarity to the present case is that a proceeding before the Board partakes not of a criminal but of an equitable nature.

Rochester Telephone Corp. v. U. S., 307 U. S. 125, at p. 142;

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, at p. 48;

Jones v. Securities & Exchange Commission, 298 U. S. 1, at p. 15.

The argument is made on behalf of the Board that special circumstances might exist creating a need for enforcement of an order of the Board during the vacation of the Circuit Courts of Appeals, while no such need could arise on behalf of petitioner to seek a prompt review of a Board order. To say that noncompliance with a Board order subjects petitioner to no penalty is to encourage noncompliance by denying to petitioner an opportunity for immediate review accorded to the Board. An additional answer is found in subsection (g) of Section 10:

“The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board’s order.”

The refusal of the District Court to take jurisdiction during the vacation of the Circuit Courts of Appeals, of an application to review an order of the Board, while recognizing the right of the Board to apply to the District Court in vacation for an order of enforcement raises a serious

question of the interpretation of Section 10(e) and (f) of the National Labor Relations Act on the equitable principle of mutuality.

Since the denial of certiorari involves no expression of opinion on the merits of the case (*Atlantic Coast Line R. R. v. Powe*, 283 U. S. 401), petitioner respectfully urges that this court should take jurisdiction to determine a doubtful construction of subsections (e) and (f) of Section 10 of the National Labor Relations Act.

Respectfully submitted,

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